United States Government
National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL

Advice Memorandum

DATE: January 27, 2005

TO : Rik Lineback, Regional Director
Region 25

FROM : Barry J. Kearney, Associate General Counsel
Division of Advice

SUBJECT: Akal Security, Inc.
Cases 25-CA-29269, 13-CA-42030, 13-CA-24058, 18-CA-17382, and 30-CA-16957

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These cases were submitted for advice as to whether the Employer unlawfully implemented a change in the manner in which employees received health and welfare payments, and, if so, the effect of the parties' subsequent agreement to place the disputed monies in a 401(k) trust fund.

We conclude, under the specific facts of this case, that the Union gave up any right it might have had to a Board order reinstating direct fringe benefits payments to employees when it proposed and agreed on a mechanism to resolve the dispute without regard to the outcome of this Board charge. Accordingly, we need not determine, absent this waiver, whether the Employer is a perfectly clear successor or whether its actions constitute an unlawful unilateral change.

FACTS

Akal Security, Inc. provides security services to governmental agencies and private businesses. On March 1, 2004,[1] the Federal Protective Service awarded Akal the "Four-State Contract" to provide security services at secured buildings in Indiana, Wisconsin, Minnesota, and northern Illinois. The Employer was directed that on July 1, it would take over from the predecessor employer, General Security Services Corporation. The existing employees had been represented by the Independent Security and Police Union (the predecessor union), under a collective-bargaining agreement effective through September 30, 2003, but subsequently extended. The contract provided that it would expire upon the termination of the business relationship between the predecessor employer and the federal government.

The predecessor's contract also provided that "the Employer will make health and welfare payments to or on

[1] All dates are in 2004, unless indicated otherwise.

behalf of seniority employees ... at the rate of $2.30 per hour." Article XIII, section 3, of the contract specifies that:

> In lieu of paying the aforementioned Health and Welfare Allowance amounts to the employees, the Employer may, at its discretion, make payments of those amounts to an Employer or Union sponsored health plan and/or retirement plan, or a plan(s) jointly administered by the Employer and the Union. The provision of or participation in such a plan(s), and any balance of the Health and Welfare Allowance payments required by law, may be offered and terminated at Employer's discretion.[2]

Under this contractual provision, the predecessor employer had directly paid its employees the $2.30 hourly supplement, rather than using the funds to purchase health coverage or a retirement plan. Akal contends (and there is no evidence to the contrary) that it was not aware of the predecessor's practice of direct cash payments to employees until June 30.

On June 1, a majority of the predecessor union's membership voted to affiliate with the Charging Party Union, the International Union, Security, Police and Fire Professionals of America (Union). On about June 9, the Union notified Akal of its merger with the predecessor Union. In early June, the Employer recognized the Union as the collective bargaining representative for employees working under the Four-State contract after July 1. The Employer, however, declined to adopt the collective-bargaining agreement between its predecessor and the predecessor Union when it assumed the work on July 1.

On or around June 28 Akal Director of Human Resources Janet Gunn told Union Vice President Bobby Jenkins that she "presumed" that Jenkins wanted to "do the same thing" with the employees' contractual fringe benefit monies that the parties had previously done under a different contract in El Paso, Texas (i.e., purchase health insurance and fund a 401(k) plan). Jenkins told Gunn that he wanted the

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[2] The Service Contract Act governs the relationship between the federal government and the contractor holding the Four-States contract. Section 2(a)(2) provides that the obligation to furnish contractual benefits "may be discharged by furnishing any equivalent combinations of fringe benefits or by making equivalent or differential payments in cash under rules and regulations established" by the Department of Labor.

opportunity to put a plan in place but that it would take a little time because Jenkins had not spoken with members yet and did not know what they wanted. Gunn told Jenkins that Akal needed to get a plan in place, and asserts that Jenkins informed her that the Union would implement a health plan. However, Gunn concedes that Jenkins informed her that he wanted to speak with members first.

On June 30, Jenkins received a letter from Gunn dated June 28. The letter provided that,

> Akal Security, Inc. plans to provide an insurance plan to all employees on this above named contract effective with the start of performance July 1, 2004.
>
> As discussed, [the Union] will provide a plan through their preferred broker. Akal Security, Inc. is pleased to have the Union provide the plan if that would be their desire going forward.
>
> Please contact me at your convenience to discuss and bargain over this issue as well as the new CBA.

After receiving this letter, Jenkins repeatedly called and left messages for Gunn, but was not able to speak to her until the end of July.

On about June 30, while pricing out payroll, Gunn discovered for the first time that the predecessor had paid its unit employees the fringe benefits payments in cash.

On July 1, Akal took over the operations of the Four-State contract. The Employer hired over 95 percent of the predecessor's approximately 500 to 600 employees who had been working under the contract. Although it is unknown when the Employer made these offers of employment, there is no evidence that employees were given unconditional offers of hire at any date prior to the point they showed up for work on July 1.[3] Furthermore, it is undisputed that on July 1 unit employees were unaware that the Employer intended to cease the predecessor's practice of making direct health and welfare payments to them in cash.

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[3] Employees apparently were given Akal "new hire packets" between June 17 and June 22, which included an application for employment; further, some employees were told that they would receive new uniforms before July 1. The evidence is inconclusive, however, that the Employer actually extended employment offers on these dates.

On about July 7, Jenkins learned for the first time that the predecessor Employer had been making fringe benefit payments in cash to employees. By that date, employees had begun to complain to the Union that, according to Akal, the Union had agreed to use this money to provide for a health and welfare plan. Jenkins and other Union representatives contacted Akal to demand that Akal continue the predecessor’s practice of direct cash payments. Akal refused, relying instead on the parties’ asserted agreement to use the money to purchase health insurance and/or a pension plan.

On July 16, unit employees received their first pay check from Akal, but without the $2.30 hourly fringe benefit payment. Rather, Akal gave each employee a copy of Gunn’s June 28 letter to Jenkins purporting to constitute an agreement to use the money to fund health and welfare plans.

On August 19, the parties met to negotiate a new collective-bargaining agreement. Gunn insisted that Akal could no longer legally hold onto the employees’ fringe benefit funds without investing it somewhere. She informed the Union that unless they agreed on that date to a health insurance plan or 401(k) plan, Akal would implement an Employer-sponsored health plan the following day. Union President David Hickey asked Gunn if she would agree to put the money into a 401(k) plan. Jenkins and Hickey assert that Hickey clearly stated that the plan would be "temporary." Hickey and Jenkins stressed that this way employees "wouldn’t lose that money, and that [the plan] would definitely have to be temporary." Gunn agreed to Hickey’s suggestion in principle. However, Jenkins and Hickey told Gunn that they first had to discuss this concept with the Union committee.

Later that afternoon, Union representatives received word from their benefits representative that a "temporary" 401(k) trust could be established. Jenkins explained to the Union committee that if the Employer put the money into a health plan that unit employees clearly did not want, they would never be able to get that money back. The Union committee voted to offer the 401(k) alternative to the Employer.

Hickey states that he proposed the 401(k) plan to the Employer committee, to be effective "until such time that we can get this situation straightened out." According to Hickey, the Union made it very clear that this was a temporary measure and that "if we are able to come to terms under a new collective bargaining agreement, then the members would no longer be participating in the 401(k) plan."

The Union's benefits representative subsequently drafted a "standard" participation agreement, and offered it to the Employer for signature. On September 1, the parties entered into the 401(k) agreement, with terms retroactive to the July 1 start-up date. Paragraph 7 of this Agreement provides in relevant part:

> This Agreement shall continue in full force and effect until superseded by a new Participation Agreement or until revoked by mutual consent of the parties.

The parties continue to bargain for a new contract, and the 401(k) plan continues to be in effect.

ACTION

We conclude, under the specific facts of this case, that the Union gave up its right to a remedial rescission of the Employer's allegedly unlawful unilateral suspension of direct benefits payments to employees because the parties agreed on a mechanism to resolve the dispute without regard to the outcome of these Board charges. Accordingly, we need not determine whether, absent this waiver, the Employer's actions constitute an unlawful unilateral change.

A successor has the freedom to set initial terms and conditions of employment for its newly-hired work force, with the exception of "instances in which it is perfectly clear that the new employer plans to retain all of the employees in the unit and in which it will be appropriate to have him initially consult with the employees' bargaining representative before he fixes terms."[4] Under those circumstances, a "perfectly clear" successor may not alter the status quo ante without affording the union an opportunity to bargain.

In light of the parties' interim settlement of the dispute, we need not specifically determine whether Akal was a "perfectly clear" successor with a bargaining obligation before it altered the employees' employment conditions.[5]

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[4] NLRB v. Burns Int'l Security Services, 406 U.S. 272, 294-95 (1972).

[5] The Employer asserts that it did not change the status quo ante by suspending direct fringe benefit payments. Akal argues that the status quo, as expressed by the predecessor contract and/or the Service Contract Act, gave it the

This is because the parties' subsequent interim resolution of the dispute at the bargaining table precludes issuance of complaint and a meaningful Board remedy.

Thus, we conclude that the parties' 401(k) plan - as structured and drafted by the Union - obstructs any possible Board rescission order. During their August 19 negotiations, the Union offered to resolve this matter for the time being by placing the dispute monies in a Union-sponsored "temporary" 401(k) plan until the situation is "straightened out." Union president Hickey states that the Union made it very clear that the 401(k) plan was merely a temporary means to safeguard the employees' money, and that participation in the plan would end "if we are able to come to terms under a new collective bargaining agreement." Thus, at bargaining, the Union specified that agreement on a new contract would provide the means with which to cease participation in the 401(k) plan. The Union did not condition the revocability of the plan on any other event, including the successful prosecution of an unfair labor practice charge. The Union's benefits expert subsequently drafted the 401(k) participation agreement, which he forwarded to the Employer for signature. The agreement, like the negotiations which led to its formation, does not provide that the agreement would terminate upon a

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discretion to modify the manner by which it granted health and welfare benefits because each authorized unilateral action with respect to the means of providing benefits. AKAL's argument appears to conflict with Board law providing that, "[a] successor employer, having chosen not to adopt the contract, cannot as a general proposition rely on a management-rights clause to promulgate new rules unilaterally without affording the union an opportunity to bargain." Holiday Inn of Victorville, 284 NLRB 916 (1987). The Board recently held in Friendly Ford, 343 NLRB No. 116 (December 16, 2004), that a predecessor employer's discretionary conduct pursuant to a contractual waiver becomes a past practice that necessarily survives a Burns succession. This holding appears distinguishable from the instant case, because, here, the predecessor employer never exercised its contractual right to alter the method of payment of fringe benefits, thus denying Akal a past practice to retain. Secondly, the Service Contract Act, 41 U.S.C. § 351, merely provides that the obligation to provide benefits may be discharged by furnishing "any equivalent combination of fringe benefits or by making equivalent or differential payments in cash …" It does not, by its terms, give an employer the right to unilaterally modify the status quo ante at its discretion. In light of our determination here it is unnecessary to definitively resolve this issue.

meritorious Labor Board finding. Rather, it merely states that it will remain in full force and effect "until superseded by a new Participation Agreement or until revoked by mutual consent of the parties."

Accordingly, the Union -- both at the table as well as on paper -- offered to place the disputed benefits monies into the 401(k) plan until the parties modified or revoked the plan by entering into a new collective-bargaining agreement. Furthermore, the Employer here did not fraudulently induce the Union or misrepresent material facts during bargaining for the 401(k) agreement, factors which might prompt the Board to vitiate their bargained-for agreement.[6] Thus, by the terms of its own proposals, we conclude that the Union gave up any right it might otherwise have had to a prospective Board rescission remedy.[7]

In so concluding, we find the Board's decision in Seascape Golf Course[8] to be distinguishable. There, the successor-employer discriminatorily refused to hire predecessor employees in a scheme to deprive the Union of its representative status. The Board ordered the retroactive restoration of the employees' terms and conditions, despite the fact that the parties had subsequently bargained for an agreement on starting wage rates after the ALJ entered his decision. The Board noted that since the parties' agreement was not final, initial restoration of the status quo ante was necessary to restore the union to the position it would

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[6] Compare Waymouth Farms, Inc., 324 NLRB 960, 963 (1999), enfm't den. 72 F.3d 598 (8th Cir. 1999).

[7] We conclude in the first instance that the parties legally were able to reach a bona fide, negotiated settlement, despite the fact that the negotiations were prompted by the Employer's unlawful unilateral change. Thus, not every unilateral change inherently taints subsequent contractual negotiations. See Dynatron/Bondo Corp., 333 NLRB 750, 752 (2001). In Dependable Maintenance Co., 274 NLRB 216 (1985), the Board acknowledged the relevance of post-ULP bargaining when it directed the ALJ to determine the effect on the remedy of the parties' bargaining subsequent to the employer's unlawful unilateral changes. Here, the Union could have refrained from agreeing to the 401(k) settlement altogether. At the least, it could have conditioned revocation of the agreement on winning its ULP case. It consciously did neither, entering instead into a bona fide resolution of the matter pending further collective bargaining.

[8] 294 NLRB 881 (1989).

have occupied but for the employer's unfair labor practice.[9] Here, however, the parties' interim 401(k) agreement is final, until revoked by a subsequent agreement. Since the parties have already determined a method to resolve their dispute pending negotiation of a collective-bargaining agreement, the necessity of restoring the parties to the status quo ante by Board order no longer exists.

In sum, the parties' interim 401(k) agreement looks to a final resolution through the collective-bargaining process, rather than through the successful prosecution of a Board charge. Under these circumstances, the Regions should dismiss the instant charges, absent withdrawal.

B.J.K.

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[9] Id. at 881 n.3.